SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1933

No. 364

THE PACIFIC TELEPHONE AND TELEGRAPH COMPANY, APPELLANT,

vs.

THE CITY OF SEATTLE AND HARRY W. CARROLL, AS COMPTROLLER, ETC.

APPEAL FROM THE SUPREME COURT OF THE STATE OF WASHINGTON

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., NOVEMBER 22, 1933

[fols. a & 1]

IN SUPERIOR COURT OF KING COUNTY

No. 254,908

THE PACIFIC TELEPHONE AND TELEGRAPH COMPANY, a Corporation, Plaintiff,

vs.

THE CITY OF SEATTLE, a Municipal Corporation, and Harry W. Carroll, as Comptroller of the City of Seattle, Defendants

AMENDED COMPLAINT—Filed Oct. 17, 1932

Comes now the plaintiff, The Pacific Telephone and Telegraph Company, and, with permission of the court, files this, its amended complaint, and for cause of action against the defendants alleges:

I

That plaintiff is a corporation duly organized and existing under and by virtue of the laws of the State of California; that it has complied with all the laws of the State of Washington, relating to foreign corporations, has paid its annual license fee last past due and all other fees required to be paid by it under the laws of the State of Washington and is duly authorized to do business therein.

II

That during all of the times referred to in this complaint, plaintiff has owned and operated, and now owns and operates, a telephone and telegraph system, and has been and is now engaged in operating and conducting a public telephone and telegraph system in the State of Washington and in the States of California, Oregon and a part of Idaho, furnishing to the public telephone exchange service and both intrastate and interstate telephone toll service and telegraph service.

[File endorsement omitted.]

Copy of within received Oct. 17, 1932. A. C. Van Soelen, Corporation Counsel.

[fol. 2]

III

That the defendant The City of Seattle is a municipal corporation organized under the laws of the State of Washington; that the defendant Harry W. Carroll is the duly elected, qualified and acting comptroller of the City of Seattle.

IV

That on May 23, 1932, the city council of the City of Seattle passed Ordinance No. 62662, entitled:

"An ordinance relating to, and providing for, a license or occupation tax upon certain businesses, occupations, pursuits and privileges, defining offenses and providing penalties."

which said ordinance was on May 25, 1932, approved by the acting mayor of said city, and on May 31, 1932, was published in the Daily Journal of Commerce; that a copy of said ordinance is hereto attached marked Exhibit "A" and by this reference made a part of this complaint.

V

The State of Washington, under tariffs approved by the Department of Public Works of the State of Washington, is divided into a number of exchange areas. Telephone exchange service is service between telephone stations within the same exchange area, and telephone toll service is telephone service between telephone stations located in different exchange areas. Among said exchange areas in the State of Washington is the "Seattle Exchange"; but which said last mentioned exchange area includes several thousand telephone stations (the exact number in 1931 being unknown to this plaintiff) outside the limits of the City of Seattle. Said telephone exchange service and intrastate telephone toll service together constitute the major portion of plaintiff's telephone service within the State of Wash-
[fol. 3] ington. Telegraph service is both intrastate and interstate, and intrastate telegraph service is service between points within the State of Washington.

VI

That by authorization of the Department of Public Works of Washington given prior to 1931, and in pur-

suance of its statutory powers, the Seattle Exchange was duly established by plaintiff prior to 1931; that the Seattle Exchange as established and at all times since maintained embraces an area including the City of Seattle and the territory immediately adjacent thereto.

VII

That the Interstate Commerce Commission in pursuance of its statutory powers has prescribed the form of accounts to be kept by telephone companies, subject to the Act to Regulate Commerce as amended (41 Stat. L. 474) and in particular in accordance with Section 20 of said Act as amended; that plaintiff is one of the telephone companies in the United States subject to said Act and is required by law to keep its accounts in the form prescribed by the Interstate Commerce Commission; that the Department of Public Works of the State of Washington by order No. 5251, dated October 31, 1921, has adopted and has prescribed for all telephone companies subject to its jurisdiction the same form of accounts as that adopted and prescribed by the Interstate Commerce Commission.

VIII

That in order for plaintiff to furnish its customers receiving exchange service in the Seattle Exchange with telephone exchange service, as hereinbefore defined, it is necessary for plaintiff to provide equipment known as "Central Office Equipment," that the term "Central Office Equipment" is defined both by the Interstate Commerce Commission and by the regulatory body of the State of Washington, as follows:

[fol. 4] "Central Office Telephone Equipment.—This account should include the cost of local and toll switchboards, chief operators', monitors', and supervisors' desks and tables, wire chiefs' testing outfits, main and intermediate frames, cables and jumper wires, call registers or meters, relay racks and coil racks, and power plants, including rectifiers, generators, engines, motors, batteries, power switchboards, meters and fuse boards; telephone and telegraph instruments, and other electrical instruments and apparatus in the central office devoted to the operation of the telephone plant."

IX

That without the use of central office equipment, it is impossible for plaintiff to render any telephone exchange service at all; that the investment by said plaintiff in central office equipment located wholly inside the city limits of Seattle is in excess of $10,000,000; that in order to render economical and efficient telephone exchange service to its customers receiving exchange service in the Seattle Exchange, it is necessary for plaintiff to run its wires or cables to some point, same being the wire center point within various districts within the Seattle Exchange, and which wires and cables are connected to the central office equipment owned and operated by plaintiff in the Seattle Exchange; that said districts are known as central office districts and are eleven in number; that in order for plaintiff's customers receiving exchange service in any one of said districts to communicate by telephone with its customers receiving exchange service within any one of said other ten central office districts, it is necessary for plaintiff to connect by means of conduits and cables the central office equipment installed in any one of said districts with the central office equipment installed in the remaining ten districts; that the central office equipment installed in each [fol. 5] of said central office districts the aggregate investment by plaintiff in which said central office equipment exceeds, as aforesaid, the sum of $10,000,000, is necessarily housed in eleven buildings located at the central wire point in said central office districts, and called central office buildings; that said buildings and the land on which said buildings are located are (with the exception of the Glendale central office) owned by said plaintiff, and all of said buildings, including the Glendale central office building, are situated wholly inside the city limits of Seattle, and the investment of said plaintiff in the land and buildings owned as aforesaid now exceeds, and did exceed in 1931, the sum of $3,000,000.

X

That plaintiff's said customers receiving exchange service within the Seattle Exchange, but receiving such service outside the city limits of Seattle, are furnished exchange service by the use of the central office equipment installed as aforesaid in the aforesaid central office buildings; that

said central office equipment is necessarily connected with the telephone equipment consisting of telephone stations, drop wires, protectors, coin boxes, etc., installed in the places of business or residences of said customers receiving service in the Seattle Exchange but outside the city limits thereof; that the connection between said central office equipment installed as aforesaid in said central office buildings and the telephone equipment installed on the premises of plaintiff's customers receiving exchange service outside the city limits of Seattle, but within the Seattle Exchange, is necessarily made by means of wires strung on poles, or cables strung on poles, or laid in conduits; that said poles, conduits, wires and cables are located partly inside and partly outside the city limits of Seattle.

[fol. 6] XI

That said lands and buildings owned and situated as aforesaid are used and of necessity used in the rendition of plaintiff's telephone exchange service in said Seattle Exchange; that it is impossible for plaintiff to determine or estimate the proportion of the moneys received by it in Seattle in 1931 from its customers receiving exchange service in the Seattle Exchange, whether such customers receive such service inside or outside the city limits of Seattle, due to the use and necessary use by said plaintiff of said lands and the buildings thereon in the rendition of said exchange service.

XII

That said plaintiff was engaged in 1931, not only in rendering telephone exchange service but also telephone toll service; that telephone toll service is divided into two classes, intrastate toll service and interstate toll service; that intrastate toll service is telephone service between telephone stations located in different exchange areas, all of which areas are located within the State of Washington; and interstate toll service is telephone service between telephone stations located in different exchange areas within the State of Washington and telephone stations located in different Exchange areas outside the State of Washington. That in order for plaintiff's customers receiving intrastate toll service inside the city limits of Seattle to communicate with plaintiff's customers receiving intra-

state toll service in areas outside the Seattle Exchange, it was necessary in 1931 and still is necessary for plaintiff to connect its telephone plant located inside the city limits of Seattle, including said central office equipment housed as aforesaid, in said central office buildings, with plaintiff's telephone plants located in exchange areas outside the Seattle Exchange: that in order for plaintiff's customers [fol. 7] receiving telephone service outside the city limits of Seattle, but within the Seattle Exchange area, to communicate with plaintiff's customers receiving intrastate toll service furnished by plaintiff in exchange areas other than the Seattle Exchange, it was necessary in 1931 and still is, for plaintiff to connect not only the telephone plant of plaintiff located inside the city limits of Seattle in which said plaintiff has invested capital of many millions of dollars, but also the telephone plant of plaintiff, including among other items of property, poles, wires, cables, conduits, telephone stations, drop wires, protectors, coin boxes, etc., (but no central office equipment or land or buildings) located outside the city limits of Seattle but within the Seattle Exchange, with the telephone plant of plaintiff located in exchange areas outside the Seattle Exchange area; that said plaintiff had in the year 1931, a capital investment in plant, land and buildings, all of which were located outside the Seattle Exchange but within the State of Washington, and used and necessarily used in the operation of its intrastate telephone toll service, in excess of $20,000,000, and which said plant, land and buildings were necessary to the rendition by plaintiff of intrastate telephone toll service to its customers receiving service within the Seattle Exchange.

XIII

That it is impossible for plaintiff to determine or estimate the proportion of the money received by it in 1931 from its customers in the Seattle Exchange receiving intrastate toll service, whether such customers receive such service inside or outside the city limits of Seattle, due to the use and necessary use by said plaintiff of (a) the lands and the buildings thereon owned and situated inside the city limits of Seattle and (b) the lands and the buildings thereon situated in other exchange areas within the State of Washington, in the rendition of said intrastate toll service.

[fol. 8] XIV

That plaintiff is engaged in rendering intrastate and interstate telegraph service; that it had long prior to 1931, duly filed with the Postmaster General of the United States, its written acceptance of the restrictions and obligations required by the Act of Congress of July 24, 1866 (14 Stat. L. 221); that plaintiff's customers residing in the City of Seattle in 1931 desiring to transmit messages by telegraph to persons residing at points other than Seattle in the State of Washington, tendered to plaintiff, either in person or by telephone, such messages at the aforesaid central office buildings of plaintiff located inside the city limits of Seattle; that said messages were accepted by and transmitted telegraphically by plaintiff; that some of plaintiff's customers residing outside the City of Seattle but within the area of the Seattle Exchange tendered in 1931 by telephone to plaintiff, messages to be transmitted telegraphically by plaintiff to points in the State of Washington other than Seattle, which said messages were accepted by and transmitted telegraphically by plaintiff; that all of said messages, tendered as aforesaid and accepted as aforesaid in the year 1931, were transmitted from the central office buildings of said plaintiff located in the City of Seattle by the use of central office equipment housed in said central office buildings and by the use of poles, wires, cables and conduits extending between said central office buildings located in the City of Seattle to central office buildings owned by plaintiff located in points other than Seattle in the State of Washington, and by the use of central office equipment housed in said buildings located as aforesaid in points other than Seattle in the State of Washington.

XV

That it is impossible for plaintiff to determine or estimate the proportion of the money received by it in 1931 [fol. 9] from its customers employing its intrastate telegraph service, whether such customers employing such service resided inside the city limits of Seattle or outside the city limits of Seattle, but, within the area of the Seattle Exchange, due to the use and necessary use by said plaintiff of (a) the lands and the buildings thereon owned and situated inside the city limits of Seattle and (b) the lands and the buildings thereon situated in points other than

Seattle in the State of Washington, which said last mentioned land and buildings were in 1931 and are now owned by plaintiff.

XVI

That plaintiff's telephone and telegraph business in the City of Seattle is conducted efficiently and economically; that plaintiff's net earnings derived from its telephone and telegraph business in the Seattle Exchange during the first three months of 1932, stated in rate per cent annual return upon the cost of plaintiff's property, used and useful in furnishing said service in said exchange and exclusively devoted to the rendition thereof was not in excess of 3.25%; that plaintiff's net earnings derived from its telephone and telegraph business in the City of Seattle, stated in rate per cent annual return upon the cost of the property located in the City of Seattle and used and useful in furnishing telephone and telegraph service and exclusively devoted to the rendition thereof during the first three months of 1932, was somewhat less than 3.25%; that the net earnings of plaintiff on said property, together with any additions made thereto during the months of April, May, June, July, August and September 1932, are now declining, and based upon past and present experience, will continue to decline throughout the year 1932.

XVII

That the defendants have at all times since the effective date of said ordinance threatened and still threaten to en- [fol. 10] force the same and the penalties thereof against the plaintiff.

XVIII

That the plaintiff has paid all taxes of any and every kind levied either by or for the State of Washington, the County of King, a municipal corporation of the State of Washington or the City of Seattle, against all of its property of any and every kind for the tax years prior to 1931; that on March 15, 1932, the plaintiff paid to the treasurer of King County, the sum of $96,908.41 being the total 1931 tax, less 3% rebate, on the real property owned by the plaintiff in the City of Seattle, and of this amount $44,164.01 was the tax levied for the City of Seattle against the said real property owned by this plaintiff in the City

of Seattle, the remainder of said amount being the tax levied for the State of Washington, for the County of King, a municipal corporation of the State of Washington in which the City of Seattle is located, for Seattle School District No. 1, and for the Port of Seattle, a municipal corporation of the State of Washington; that on March 15, 1932, the plaintiff paid to the treasurer of King County, $302,590.97, being the first half of the 1931 tax levied against all of the plaintiff's personal property located in King County, Washington, $126,664.52 of said amount being the amount of taxes levied for the City of Seattle against the personal property of the plaintiff located inside the city limits of Seattle, the remainder of said amount being the amount of taxes levied for the State of Washington, for the county of King, for Seattle School District No. 1 and various other school districts in said County of King, for the Port of Seattle, a municipal corporation of the State of Washington, and for various towns and road districts in said county located outside the city limits of Seattle; that the remaining one-half of said personal property tax for the year 1931 can be paid without penalty on or before November 30, 1932.

[fol. 11] XIX

That said ordinance No. 62662 is invalid and void:

(1) For the reason that cities of the first class have power only to license, but do not have power to license for revenue.

(2) For the reason that it violates Chapter 227 of the Laws of 1929 of the State of Washington, pursuant to which plaintiff is licensed to engage in the telephone business in and througout the State of Washington, including the City of Seattle.

(3) For the reason that it conflicts with Chapter 107 of the Laws of 1929, and with Chapter 107 of the Laws of 1923 of the State of Washington, pursuant to which plaintiff has paid and still pays a fee of one-tenth of one per cent of its gross operating revenue, exclusive of revenue from interstate transactions, said payment in the year 1932,

being $12,277.11, into the public service revolving fund of the State of Washington.

(4) For the reason that it conflicts with the public service commission law of the State of Washington, being Sections 10339 to 10459 inclusive, of Remington's Compiled Statutes of the State of Washington, and amendments thereto, pursuant to which plaintiff is under the exclusive jurisdiction of the Department of Public Works of the State of Washington as to the conduct and operation of its business, including its rate of return, throughout the State of Washington, including the City of Seattle, and has a continuous duty to serve the public and cannot cease to do its business or any part thereof in the City of Seattle, or elsewhere in the State of Washington, without the consent of the State of Washington.

(5) For the reason that it conflicts with the common law of the State of Washington relating to businesses affected with a public interest, including the business of the plaintiff, in that under said common law plaintiff cannot cease [fol. 12] to do its business or any part thereof in the City of Seattle, or elsewhere in the State of Washington, without the consent of the State of Washington.

(6) For the reason that in view of the premises said City of Seattle has no power to license or refuse to license plaintiff for the conduct of its business within the City of Seattle, and having no power to license at all, has no power to license for revenue.

(7) For the reason that the said tax attempted to be imposed by said ordinance No. 62662, being a tax on gross income, is a direct property tax, and that defendant city has no power, either by statute or constitution, to levy a direct property tax upon only the public utilities and others, including plaintiff, mentioned in said ordinance, in addition to direct property taxes already paid by said utilities and others, including plaintiff, on their real and personal property.

(8) For the reason that said ordinance violates Article I, Section 3 of the Constitution of the State of Washington, in that it deprives plaintiff of property without due process of law, on the following grounds:

(a) That plaintiff is not now and for more than twenty-one months last past has not been earning a fair return upon its property within the City of Seattle used and useful in the public service, and that said tax or any portion thereof, required by said ordinance is arbitrary, unreasonable, oppressive and confiscatory of plaintiff's property.

(b) That said ordinance undertakes completely to prohibit the doing of an entirely lawful business except upon payment of a non-regulatory license fee with respect to a business that said city has no power to regulate.

[fol. 13] (c) That said ordinance is so vague and indefinite in its definition of gross income as to render it impossible for plaintiff thereunder to compute, with reasonable certainty, the amount of the tax, if any, owing by it thereunder, and subjects plaintiff to criminal penalties for noncompliance with the said vague and indefinite terms of said ordinance.

(d) That said ordinance is vague and indefinite, in that it fixes no method of computation whereby plaintiff, with reasonable certainty, can segregate its interstate business from its business conducted wholly within the City of Seattle, nor any method whereby plaintiff can, with reasonable certainty segregate its business conducted wholly within the city of Seattle from its intrastate business conducted between the said City of Seattle and points outside said City in the State of Washington.

(9) For the reason that said ordinance violates Article I, Section 12, of the Constitution of the State of Washington, in that said license fee is arbitrary and discriminatory, because different rates are fixed by said ordinance on businesses (public utilities) in the same general class.

(10) For the reason that said ordinance violates Article VII Section 9, of the Constitution of the State of Washington, in that being a tax on gross revenue, it imposes a direct property tax not uniform in respect to persons and property within the jurisdiction of the body levying the same.

(11) For the reason that said ordinance conflicts with the due process clause of the Fourteenth Amendment to the

Constitution of the United States, on the following grounds:

(a) That plaintiff is not now and for more than twenty-one months last past has not been earning a fair return upon its property within the City of Seattle used and useful in the public service, and that said license fee, or any [fol. 14] portion thereof, required by said ordinance is arbitrary, unreasonable, oppressive and confiscatory of plaintiff's property.

(b) That said ordinance undertakes completely to prohibit the doing of an entirely lawful business except upon payment of a non-regulatory license fee, with respect to a business that said City has no power to regulate.

(c) That said ordinance is so vague and indefinite in its definition of gross income as to render it impossible for plaintiff thereunder to compute, with reasonable certainty, the amount of the tax, if any, owing by it thereunder, and subjects plaintiff to criminal penalties for noncompliance with the said vague and indefinite terms of said ordinance.

(d) That said ordinance is vague and indefinite, in that it fixes no method of computation whereby plaintiff, with reasonable certainty, can segregate its interstate business from its business conducted wholly within the City of Seattle, nor any method whereby plaintiff can, with reasonable certainty, segr-ate its business conducted wholly within the City of Seattle from its intrastate business conducted between the said City of Seattle and points outside said city.

(12) For the reason that said ordinance conflicts with the equal protection clause of the Fourteenth Amendment to the Constitution of the United States, in that the license fees fixed by said ordinance are arbitrary and discriminatory because different rates are fixed by said ordinance on businesses (Public utilities) in the same general class.

(13) For the reason that said ordinance conflicts with the equal protection clause of the Fourteenth Amendment to the Constitution of the United States, in that the license tax imposed thereunder, being a direct property tax, con-[fol. 15] stitutes an additional property tax on the property of plaintiff and is levied on an unequal and discriminatory

basis on the public utilities included and affected by the ordinance.

XX

That the General Fund of the defendant City of Seattle, is now heavily overdrawn, and that the banks in the said city have since May, 1932, refused to cash or accept any and all warrants on said fund, and that warrants on said fund, cannot be cashed, and that even if said license tax were computable by plaintiff, with reasonable certainty, and plaintiff paid the same, the time of repayment thereof to plaintiff by said city is wholly conjectural and uncertain.

XXI

That plaintiff has no adequate remedy at Law, and that unless equitable relief by injunction, temporary and permanent, is granted by this court, plaintiff will be deprived of its rights as hereinbefore alleged; that the loss resulting from the enforcement of said ordinance is irreparable, and that the penalties provided by said ordinance are so severe and will lead to such a multiplicity of suits and prosecutions that plaintiff has no adequate remedy except in a court of equity.

Wherefore, plaintiff prays the judgment and decree of this court as follows:

1. That the defendants and each of them and their agents servants and employees be temporarily and permanently enjoined and restrained from enforcing as against this plaintiff, the said ordinance No. 62662, or any portion thereof.

2. That the defendants and each of them, be required to show cause on a day certain, to be fixed by this court, why [fol. 16] a temporary injunction should not issue against the defendants, and each of them, and against their agents, servants and employees, from enforcing as against this plaintiff, the said ordinance No. 62662 or any portion thereof.

3. That upon the trial of the merits of this cause a permanent injunction issue against the said defendants, and each of them, and their agents, servants and employees,

from enforcing as against this plaintiff the said ordinance or any portion thereof.

4. That the plaintiff do have and recover its costs and disbursements herein.

5. That plaintiff have such other and further relief as to the court shall seem meet and equitable in the premises.

McMicken, Ramsey, Rupp & Schweppe, Attorneys for Plaintiff.

Duly sworn to by I. F. Dix. Jurat omitted in printing.

[fol. 17] EXHIBIT "A" TO AMENDED COMPLAINT

Ordinance No. 62662 (Council Bill 53240)

An Ordinance Relating to and Providing for a License or Occupation Tax Upon Certain Businesses, Occupations, Pursuits and Privileges, Defining Offenses and Providing Penalties

Be it ordained by the City of Seattle as follows:

Section 1. Exercise of Revenue License Power: The provisions of this ordinance shall be deemed an exercise of the power of the City of Seattle to license for revenue.

Section 2. Definitions: In construing the provisions of this ordinance, save when otherwise plainly declared or clearly apparent from the context, the following definitions shall be applied;

Gross Income: The value proceeding or accruing from the sale of tangible property or service, and receipts (including all sums earned or charged, whether received or not) by reason of the investment of capital in the business engaged in, including rentals royalties, fees or other emoluments, however designated (excluding receipts or proceeds from the use or sale of real property or any interest therein, and proceeds from the sale of notes, bonds, mortgages, or other evidences of indebtedness or stocks and the like) and without any deduction on account of the cost of the property sold, the cost of materials used, labor, costs, interest or discount paid, or any expense whatsoever, and without any deduction on account of losses.

Person or Persons: Persons of either sex, firms, copartnerships, corporations and other associations of natural persons, whether acting by themselves or by servants, agents or employes.

Taxpayer: Any person liable to the license fee or tax imposed by this ordinance.

Tax Year or Taxable Year: The year commencing March 1st and ending on the last day of February of the following year, or in lieu thereof the taxpayer's fiscal year when per- [fol. 18] mission is obtained from the City Comptroller to the same as the tax period.

Section 3. "Occupation License" Required: After the 1st day of July 1932, no person shall engage in or carry on any business, occupation, pursuit or privilege for which a license fee or tax is imposed by this ordinance without having first obtained and being the holder of a valid and subsisting license so to do, to be known as an "Occupation License".

Any person engaging in, or carrying on, more than one such business, occupation, pursuit or privilege shall pay the license tax so imposed upon each of the same.

Any taxpayer who engages in, or carries on, any business subject to tax hereunder without having his "Occupation License" so to do, shall be guilty of a violation of this ordinance for each day during which the business is so engaged in or carried on, and any taxpayer who fails or refuses to pay the license fee or tax or any part thereof on or before the due date shall be deemed to be operating without having his license so to do.

Section 4. License Tax Year: All "Occupation Licenses" shall be for the tax year for which issued and shall expire at the end of such tax year.

Such "Occupation License" and the fee or tax therefor hereby imposed shall be for the year commencing March 1st and ending on the last day of February of the following year; Provided however, that if the taxpayer in transacting his business keeps the books reflecting the same for a fiscal year not based on the calendar year, he may, with the assent of the City Comptroller, obtain his license for the period of his current fiscal year which shall be deemed his tax year, and pay the fee or tax computed upon his gross income made during his fiscal year (next preceding

his tax year) covering his accounting period as shown by the method of keeping the books of the business.

[fol. 19] Section 5. Occupations Subject to Tax-Amount: There are hereby levied and shall be collected annual license fees or occupation taxes against the persons on account of the business activities, and in the amounts to be determined by the application of the rates against gross income as follows:

(a) Upon every person engaged in or carrying on a telegraph and/or telephone business, a fee or tax equal to four per cent (4%) of the total gross income from such business in the City during his fiscal year next preceding the tax year for which the license is required; provided however, that the minimum fee or tax shall not be less than One Thousand ($1,000.00) Dollars per tax year.

(b) Upon every person engaged in or carrying on the business of selling or furnishing gas and/or water for hire, a fee or tax equal to three per cent (3%) of the total gross income from such business in the City during his fiscal year next preceding the tax year for which the license is required; provided, however, that the minimum fee or tax shall not be less than One Thousand ($1,000.00) Dollars per tax year.

(c) Upon every person engaged in or carrying on the business of selling or furnishing electric light and power, a fee or tax equal to three per cent (3%) of the total gross income from such business in the City during his fiscal year next preceding the tax year for which the license is required; provided, however, that the minimum fee or tax shall not be less than Two Hundred Fifty ($250.00) Dollars per tax year.

(d) Upon every person conducting or engaged in the business of supplying steam heat or power to the public for hire, a fee or tax equal to four per cent (4%) of the total gross income from such business in the City during his fiscal year next preceding the tax year for which the license is required; provided, however, that the minimum fee or tax shall not be less than Fifty ($50.00) Dollars per [fol. 20] tax year.

(e) Upon every person engaged in the business of operating or conducting a fire alarm system, district tele-

graph or burglary and police alarm system for hire, a fee or tax equal to two per cent (2%) of the total gross income from such business in the City during his fiscal year next preceding the tax year for which the license is required; provided, however, that the minimum fee or tax shall not be less than One Hundred ($100.00) Dollars per tax year.

Section 6. City of Seattle, Subject to Tax: Subdivisions (b) and (c) of Section 5 shall, so far as permitted by law, be applicable to the City of Seattle, except that said City shall not, as a taxpayer, be required to conform to the other provisions of this ordinance.

Section 7. Occupations and Privileges Subject to Tax—Amount: There are hereby levied, and shall be collected, annual license fees or occupation taxes against the persons on account of the business activities or privileges and in the amounts hereinafter fixed, as follows:

(a) Upon every person engaged in or carrying on the business of operating any motor vehicle for the transportation of passengers for hire at rates per trip or based on the distance and/or time employed, and driven by the owner or his representative under the routing or direction of the passenger or person hiring the same, the following tax or fee:

When such vehicle does not stand in or upon any public street, alley or other public place, or upon any place open to the public for the use of vehicles while awaiting employment:

For each such vehicle having a seating capacity of seven (7) persons, or less, Fifteen ($15.00) Dollars per tax year;

For each such vehicle having a seating capacity of eight (8) to ten (10) persons, inclusive, Twenty ($20.00) Dollars per tax year;

[fol. 21] For each such vehicle having a seating capacity of eleven (11) to fifteen (15) persons, inclusive, Thirty-six ($36.00) Dollars per tax year;

For each such vehicle having a seating capacity of sixteen (16) to twenty (20) persons, inclusive, Fifty-four ($54.00) Dollars per tax year;

For each such vehicle having a seating capacity of more than twenty (20) persons, Seventy-two ($72.00) Dollars per tax year.

When such vehicle stands in or upon any public street, alley or other public place, or any place open to the public for the use of vehicles while awaiting employment.

For each such vehicle having a seating capacity of seven (7) persons, or less, Thirty ($30.00) Dollars per tax year;

For each such vehicle having a seating capacity of eight (8) to ten (10) persons, inclusive, Thirty-six ($36.00) Dollars per tax year;

For each such vehicle having a seating capacity of eleven (11) to fifteen (15) persons, inclusive, forty ($40.00) Dollars per tax year;

For each such vehicle having a seating capacity of sixteen (16) to twenty (20) persons, inclusive, Fifty-four ($54.00) Dollars per tax year;

For each such vehicle having a seating capacity of more than twenty (20) persons, inclusive, Seventy-two ($72.00) Dollars per tax year.

In determining the seating capacity of any such vehicle the driver and conductor shall be included.

(b) Upon every person engaged in or carrying on the business of operating any motor vehicle over the public streets for the purpose of sight-seeing or showing points of interest, and not elsewhere herein mentioned and licensed, a fee or tax in the same amount as required for the business of operating the vehicles mentioned in Sub-[fol. 22] Section (a) of this section, provided, however, that the vehicles mentioned in this sub-section may be operated by the licensee at rates based on time employed, whether for sight-seeing purposes or not (known as "for hire" service) without securing in addition the license required by said Sub-Section (a).

In determining the seating capacity of any such sight-seeing vehicle the driver and announcer shall be included.

(c) Upon every person engaged in or carrying on the business of operating any motor vehicle over the public streets for the transportation of passengers for hire between common carrier passenger terminals or depots and hotels, and not elsewhere herein mentioned and licensed, for each vehicle Sixty ($60.00) Dollars per tax year.

(d) Upon every person engaged in or carrying on the business of letting the use of any motor vehicle at rates per trip, or based on distance travelled, or time employed and to be driven and routed or directed by the person or persons hiring or renting the same, the following tax or fee:

For each such vehicle which does not stand in or upon any public street, alley or other public place, or any place open to the public for the use of vehicles while awaiting employment, Fifteen ($15.00) Dollars per tax year;

For each such vehicle standing in or upon any public street, alley or other public place, or any place open to the use of the public for vehicles while awaiting employment, Thirty ($30.00) Dollars per tax year.

(e) Upon every person engaged in or carrying on the business of operating any vehicle drawn by or attached to any motor driven and used for the transportation of baggage, express, freight, household goods, merchandise or materials for hire, and which vehicle receives or discharges baggage, express, freight, household goods, merchandise, [fol. 23] or other materials at points within or without the City, and which does not operate over a defined route:

For each such vehicle of not more than								1	tons	capacity,	$3.00	per	tax	year.
"	"	"	"	"	"	"	"	2	"	"	6.00	"	"	"
"	"	"	"	"	"	"	"	3	"	"	9.00	"	"	"
"	"	"	"	"	"	"	"	4	"	"	12.00	"	"	"
"	"	"	"	"	"	"	"	5	"	"	15.00	"	"	"
"	"	"	"	"	"	"	"	6	"	"	18.00	"	"	"
"	"	"	"	more than				6	"	"	21.00	"	"	"

No license required by this ordinance for the operation of any vehicle shall be issued unless the licenses and/or permits therefor required by law or ordinances other than this have been granted.

Section 8. Tax Apportioned for Year 1932: For the remainder of the tax year 1932, ending on the last day of February, 1933, the fees or taxes herein imposed shall be apportioned in the ratio of said remainder to a full tax year.

Section 9. Exceptions and Deductions: There shall be excepted and deducted from the total gross income upon which the license fee or tax is computed so much thereof as is derived from transactions in interstate or foreign commerce, or from business done for the government of the

United States, its officers or agents, and any amount paid by the taxpayer to the United States, the State of Washington, or the City of Seattle, as excise taxes levied or imposed upon the sale or distribution of property or services.

Nothing in this ordinance shall be construed as requiring a license, or the payment of a license fee or tax, or the doing of any act, which would constitute an unlawful burden or interference in violation of the Constitution or laws of the United States, or which would not be consistent with the Constitution or laws of the State of Washington.

Any person subject to the payment of a license fee or tax under the provisions of any ordinance of the City, other than this, on account of engaging in any activity for which [fol. 24] he is liable to tax hereunder, may deduct the amount of such fee or tax from the amount of fee or tax imposed by this ordinance on account of such activity, but such person shall nevertheless, in the manner herein provided for, apply for and procure an "Occupation License."

Section 10. Application or Return for License: On or before the 1st day of July, 1932, and thereafter on or before the first day of each tax year, every taxpayer shall apply to the City Comptroller for an "Occupation License" upon blanks or forms of return to be prepared and provided by him requesting such information as may be necessary to enable him to arrive at the lawful amount of the fee or tax. The taxpayer shall, in a legible manner, write in such blank or form of return the information required and shall sign the same and by affidavit at the foot thereof shall swear or affirm that the information therein given is full and true and that he knows the same to be so.

Every such application or return shall be accompanied by a remittance by bank draft, certified check, cashier's check, or money order, payable to the City Treasurer, or in cash, in the amount of the tax or fee or installment thereof required by the provisions hereof.

If the applicant be a partnership, the application or return must be made by one of the partners; if a corporation, by one of the officers thereof; if a foreign corporation, co-partnership or non-resident individual, by the resident agent or local manager of sad corporation, co-partnership or individual.

Section 11. Monthly and Quarterly Payment of Tax: Where the amount of the license fee or tax is based upon gross income, the taxpayer may pay his fee or tax in equal monthly installments during the life of his license, each such installment to be paid on or before the 10th day of the month. In all other cases the taxpayer may pay his fee or tax in equal installments during the life of his license, each such installment to be paid on or before the 1st day of March, the 1st day of June, the 1st day of September, and [fol. 25] the 1st day of December, respectively.

Section 12. When Tax Based on Current Year—Commencement of Business During Tax Year: Where a business, occupation or pursuit subject to tax upon gross income has not been carried on for the full calendar or fiscal year next preceding the tax year for which license is required, the license fee or tax shall be paid monthly in installments during the life of the license on or before the 10th day of the month, and shall be based upon the gross income for the month next preceding that in which payment is due. In such cases the taxpayer shall make monthly returns similar to the annual returns provided for herein on or before the 10th day of the month, under oath or affirmation covering the business of the previous month.

In all other cases where a person commences during any tax year to engage in any business, occupation, pursuit or privilege, he shall be entitled to a license for the remainder of such tax year for the required fee apportioned in the ratio of said remainder to a full tax year.

Section 13. Monthly Payments—License Prerequisites: In any case where the taxpayer pays his license fee or tax monthly he shall nevertheless first procure his "Occupation License" in the manner herein required before commencing or continuing in business, and shall pay the minimum fee or tax therefor, which shall be credited against future installments.

Section 14. Sale or Transfer of Business: Upon the sale or transfer during any tax year of a business on account of which a fee or tax is hereby required, the purchaser or transferee shall, if the fee or tax has not been paid in full for said year, be responsible for its payment for that portion of said year during which he carries on such business.

Section 15. Taxpayer to Keep Books and Records—Returns Confidential: It shall be the duty of each taxpayer taxed upon his gross income to keep and enter in a proper [fol. 26] book or set of books or records an account which shall accurately reflect the amount of his gross income, which account shall always be open to the inspection of the City Comptroller, or his duly authorized agent, and from which said officer or his agent may verify the return made by the taxpayer.

The applications, statements or returns made to the City Comptroller, pursuant to this ordinance, shall not be made public, nor shall they be subject to the inspection of any person except the Mayor, the Corporation Counsel, the City Comptroller, or his authorized agent, and members of the City Council.

Section 16. Comptroller to Investigate Returns: If any taxpayer fails to apply for license or make his return, or if the City Comptroller is dissatisfied as to the correctness of the statements made in the application or return of any taxpayer, said officer, or his authorized agent, may enter the premises of such taxpayer at any reasonable time for the purpose of inspecting his books or records of account to ascertain the amount of the fee or tax or to determine the correctness of such statements, as the case may be, and may examine any person under oath administered by said officer, or his agent, touching the matters inquired into, or said officer, or his authorized agent, may fix a time and place for an investigation of the correctness of the return and may issue a subpœna to the taxpayer, or any other person, to attend upon such investigation and there testify, under oath administered by said officer, or his agent, in regard to the matters inquired into and may, by subpœna, require him, or any person, to bring with him such books, records and papers as may be necessary.

Section 17. Over or Underpayment of Tax: If the City Comptroller upon investigation or upon checking returns finds that the fee or tax paid or any of them is more than the amount required of the taxpayer, he shall refund the amount overpaid by a warrant upon the General Fund. If the City Comptroller finds that the fee or tax paid is [fol. 27] less than required, he shall send a statement to

the taxpayer showing the balance due, who shall, within three (3) days pay the amount shown thereon.

Section 18. Remedy for Non-payment of Tax: If any taxpayer fails to apply for license, or make his return, or to pay the fee or tax therefor, or any part thereof, within three (3) days after the same shall have become due, the City Comptroller shall ascertain the amount of the fee or tax or installment thereof due and shall notify such taxpayer thereof, who shall be liable therefor to any suit or action by the City for the collection thereof. The City Comptroller shall also notify the Corporation Counsel in writing of the name of such delinquent taxpayer and the amount due from him and said officer shall, with the assistance of the City Comptroller, collect the same by any appropriate means or by suit or action in the name of the City.

Section 19. Appeals to City Council: Any taxpayer aggrieved by the amount of the fee or tax found by the City Comptroller to be required under the provisions of this ordinance, may appeal to the City Council from such finding by filing a written notice of appeal with the City Clerk within five (5) days from the time such taxpayer was given notice of such amount. The Clerk shall, as soon as practicable, fix a time and place for the hearing of such appeal, which time shall be not more than ten (10) days after the filing of the notice of appeal, and he shall cause a notice of the time and place thereof to be delivered or mailed to the appellant. At such hearing, the taxpayer shall be entitled to be heard and to introduce evidence in his own behalf. The City Council shall thereupon ascertain the correct amount of the fee or tax by resolution and the City Clerk shall immediately notify the appellant thereof, which amount, together with costs of the appeal, if appellant is unsuccessful therein, must be paid within three (3) days after such notice is given.

[fol. 28] The President of the City Council, or the Chairman of any committee thereof before which the appeal is to be heard, may, by subpœna, require the attendance thereat of any person, and may also require him to produce any pertinent books and records. Any person served with such subpœna shall appear at the time and place therein stated and produce the books and records required, if any, and shall testify truthfully under oath administered

by the Chairman in charge of the hearing on appeal as to any matter required of him pertinent to the appeal, and it shall be unlawful for him to fail or refuse so to do.

Section 20. Comptroller to Make Rules: The City Comptroller shall have the power, and it shall be his duty, from time to time, to adopt, publish and enforce rules and regulations not inconsistent with this ordinance or with law for the purpose of carrying out the provisions thereof, and it shall be unlawful, to violate or fail to comply with, any such rule or regulation.

Section 21. Licenses—Posting—Unlawful Use of: All licenses issued pursuant to the provisions of this ordinance shall be kept posted by the licensees in a conspicuous place in his principal place of business in the City, except that all licenses for the operation of a vehicle shall be attached in a conspicuous place upon the right hand side of such vehicle in a suitable holder to be furnished by the City Comptroller upon the payment of a fee of Twenty-five ($.25) cents.

No person to whom a license has been issued, pursuant to this ordinance, shall suffer or allow any other person chargeable with a separate license to operate under or display his license, nor shall such other person operate under or display such license.

Section 22. False Returns, etc.: It shall be unlawful for any person liable to tax hereunder to fail or refuse to make application or return for a license or to pay the fee or tax or installment thereof when due, or for any person to make [fol. 29] any false or fraudlent application or return or any false statement or representation in, or in connection with, any such application or return, or to aid or abet another in any attempt to evade payment of the fee or tax, or any part thereof, or for any person to fail to appear and/or testify in response to subpœna issued pursuant hereto, or to testify falsely upon any investigation of the correctness of a return, or upon the hearing of any appeal, or in any manner to hinder or delay the City, or any of its officers in carrying out the provisions of this ordinance.

Section 23. Effect of Partial Invalidity: If any provision or section of this ordinance shall be held void or unconstitutional, all other parts, provisions and sections of this

ordinance not expressly so held to be void or unconstitutional shall continue in full force and effect.

Section 24. Penalty: Any person violating or failing to comply with any of the provisions of this ordinance or any lawful rule or regulation adopted by the City Comptroller pursuant thereto, shall be deemed guilty of a misdemeanor and upon conviction thereof, shall be punished by a fine in any sum not to exceed Three Hundred ($300.00) Dollars, or by imprisonment in the City Jail for a term not exceeding ninety (90) days, or by both such fine and imprisonment.

Section 25. This ordinance shall take effect and be in force thirty days from and after its passage and approval, if approved by the Mayor; otherwise it shall take effect at the time it shall become a law under the provisions of the city charter.

Passed the City Council 23 day of May, 1932, and signed by me in open session in authentication of its passage this 23 day of May, 1932.

James Scavatto, President pro Tem. of the City Council.

[fol. 30] Approved by me this 25 day of May, 1932.

Philip Tindall, Acting Mayor.

Filed by me this 25 day of May, 1932.

Attest:

H. W. Carroll, City Comptroller and ex-Officio City Clerk, by E. M. Street, Deputy Clerk. (Seal.)

Published May 31, 1932.

H. W. Carroll, City Comptroller and ex-Officio City Clerk, by E. M. Street, Deputy Clerk.

[fol. 31] In Superior Court of King County

[Title omitted]

Demurrer to Amended Complaint—Filed Oct. 18, 1932

Come now the defendants and demur to the amended complaint of plaintiff herein on the ground and for the rea-

son that the same does not state facts sufficient to constitute a cause of action, either at law or in equity.

A. C. Van Soelen, Corporation Counsel; Walter L. Baumgartner, Assistant, Attorneys for Defendants.

[File endorsement omitted.]

[fol. 32] IN SUPERIOR COURT OF KING COUNTY

No. 254,908

THE PACIFIC TELEPHONE AND TELEGRAPH COMPANY, a Corporation, Plaintiff,

vs.

THE CITY OF SEATTLE, a Municipal Corporation, and Harry W. Carroll, as Comptroller of the City of Seattle, Defendants

JUDGMENT AND DECREE OF DISMISSAL—Filed Oct. 18, 1932

This cause coming on for hearing before the Honorable J. T. Ronald, one of the judges of the above entitled Court, on this 18th day of October, 1932, plaintiff appearing by McMicken, Ramsey, Rupp & Schweppe, its attorneys, and defendants appearing by A. C. Van Soelen, Corporation Counsel, and Walter L. Baumgartner, Assistant Corporation Counsel, and the Court having entered an order on this date sustaining the demurrer of the defendants to plaintiff's amended complaint herein, to which order plaintiff duly excepted, thereupon said plaintiff by its said counsel gave notice in open Court that it elects to stand upon the said amended complaint and declines to plead further;

Wherefore, by reason of the law and the premises, it is by the Court considered, ordered and decreed that plaintiff's cause of action be and the same is hereby dismissed, and that defendants go hence without day, and that defendants recover of plaintiff their costs and disbursements herein.

At the time of the signing of this judgment plaintiff duly excepted to the same, and said exception is hereby allowed.

Done in open Court this 18th day of October, 1932.

J. T. Ronald, Judge.

[fol. 33] Presented by Otto B. Rupp.

IN SUPERIOR COURT OF KING COUNTY

ORDER ALLOWING APPEAL

At the time the above and foregoing judgment and decree are entered and made, the above named plaintiff in said cause, by its said attorneys, gives notice in open court that it appeals from said judgment and decree, and from each and every ruling of the Court adverse to plaintiff, to the Supreme Court of the State of Washington, and said appeal is hereby allowed, and the Clerk of this Court is directed to make an entry of said notice of appeal in the journal of the Court.

Done in open Court this 18th day of October, 1932.

J. T. Ronald, Judge.

Presented by Otto B. Rupp.

Entered in Execution Docket, vol. 109, page 311.
Judgment No. 118,633.

[File endorsement omitted.]

[fols. 34 & 35] Bond on appeal for $200.00, approved and filed Oct. 19, 1932, omitted in printing.

[fol. 36] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 37]. IN SUPREME COURT OF WASHINGTON

En Banc

No. 24327

THE PACIFIC TELEPHONE AND TELEGRAPH COMPANY, a Corporation, Appellant,

v.

THE CITY OF SEATTLE, a Municipal Corporation, and Harry W. Carroll, as Comptroller of the City of Seattle, Respondents

OPINION—Filed April 21, 1933

The plaintiff brought this action to enjoin the defendant from collecting a license tax under ordinance No. 62,662, being entitled:

"An ordinance relating to, and providing for, a license or occupation tax upon certain businesses, occupations, pursuits and privileges; defining offenses and providing penalties."

A demurrer interposed to the amended complaint was sustained. The plaintiff, electing to stand on the pleading, appeals from a judgment dismissing the action and assigns error as follows:

"I. The court erred in sustaining respondents' demurrer to appellant's amended complaint.

"II. The court erred in dismissing appellant's cause of action.

"III. The court erred in failing to hold that the enforcement of the ordinance as to appellant would contravene the Fourteenth Amendment to the Constitution of the United States, and article I, § 3, and article VII, § 9, of the constitution of the state of Washington."

The pertinent provisions of the ordinance are:

"Section 1. Exercise of Revenue License Power: The provisions of this ordinance shall be deemed an exercise of the power of the City of Seattle to license for revenue."

"Section 2. * * * Gross Income: The value proceeding or accruing from the sale of tangible property or service, and receipts (including all sums earned or charged, whether received or not) by reason of the investment of capital in the business engaged in, including rentals, royalties, fees or other emoluments, however designated (excluding receipts or proceeds from the use or sale of real property or any interest therein, and proceeds from the sale of notes, bonds, mortgages, or other evidences of indebtedness or stocks and the like) and without any deduction on [fol. 38] account of the cost of the property sold, the cost of materials used, labor, costs, interest or discount paid, or any expense whatsoever, and without any deduction on account of losses."

"Section 5. Occupations Subject to Tax-Amount: There are hereby levied and shall be collected annual license fees or occupation taxes against the persons on account of the business activities, and in the amounts to be determined by the application of the rates against gross income as follows:

"(a) Upon every person engaged in or carrying on a telegraph and/or telephone business, a fee or tax equal to four per cent (4%) of the total gross income from such business in the city during his fiscal year next preceding the tax year for which the license is required; provided however, that the minimum fee or tax shall not be less than One Thousand ($1,000.00) Dollars per tax year."

The appellant sets up some twenty-one separate grounds or reasons why the tax sought to be collected from it under the ordinance is invalid. For the purposes of this discussion, these may be classified into five groups: (1) That the city has no power to levy such a tax; (2) that the state has preempted this field of taxation; (3) that the definition of "Gross Income" is so indefinite and uncertain that neither the income subject to the tax nor the amount thereof can be ascertained; (4) that the tax is unreasonable, oppressive and confiscatory; and (5) that the tax is in contravention of appellant's rights under the Act of Congress of July 24, 1866, known as the Post Roads Act.

I. It is first contended that there is no grant of power from the state to the city to levy such a tax. The power, under which the right to levy the tax is asserted, is found in Rem. Comp. Stat., §§ 8966 and 8981.

Section 8966 relates to the powers of cities of the first class, and, among other things, provides:

"Any such city shall have power—

* * * * * * *

"33. To grant licenses for any lawful purpose, and to fix by ordinance the amount to be paid therefor, and to provide for revoking the same: Provided, that no license shall be granted to continue for longer than one year from the date thereof; * * *"

Section 8981 provides:

[fol. 39] "Any city adopting a charter under the provisions of this act shall have all the powers which are now or may hereafter be conferred upon incorporated towns and cities by the laws of this state, and all such powers as are usually exercised by municipal corporations of like character and degree, whether the same shall be specifically enumerated in this act or not."

This court has held in numerous cases that cities and towns, under the powers granted, have the right to impose license taxes either for the purpose of regulation or revenue. Fleetwood v. Read, 21 Wash, 547, 58 Pac. 665, 47 L. R. A. 205; Walla Walla v. Ferdon, 21 Wash. 308, 57 Pac. 796; Stull v. DeMattos, 23 Wash. 71, 62 Pac. 451, 51 L. R. A. 892; In re Garfinkle, 37 Wash. 650, 80 Pac. 188; Town of Sumner v. Ward, 126 Wash. 75, 217 Pac. 502; Town of Bucoda v. Swaney, 163 Wash. 43, 299 Pac. 652.

Speaking of the grant of power contained in subdivision 33, § 8966, supra, in the Fleetwood case, Judge Dunbar said:

"This provision is in relation to cities of the first class. * * * The language is comprehensive. The authority is to grant licenses for any lawful purpose, and, in the absence of restriction, the purpose of raising revenue is as lawful as the purpose of exercising the police power. This interpretation is borne out, we think, by the authorization of the legislature to cities of other classes. * * * And so the power to license for purposes of revenue is especially granted to all the other classes of cities."

We think that, by virtue of § 8981, supra, the power to license for purposes of revenue is also "especially granted"

to cities of the first class. In any event, subdivision 33 of § 8966 has been uniformly construed to confer such power. Pacific Tel. & Tel. Co. v. Everett, 97 Wash. 259, 166 Pac. 650.

II. It is contended that, conceding the power, the city is precluded from exercising it, because the state has pre-empted this field of taxation. With respect to police powers, it is a rule of universal application that a municipality may not enact regulatory ordinances upon subjects covered by state legislation. State ex rel. Webster v. Superior Court, 67 Wash. 37, 120 Pac. 861; Seattle Electric Co. v. Seattle, 78 Wash. 203, 138 Pac. 892. Whether this rule is applicable [fol. 40] in cases involving the exercise of the taxing power, it is not necessary for us to determine, because the state had not entered this field of taxation at the time the ordinance in question was enacted.

It must be kept in mind that the power granted to the city to issue licenses is dual: (1) for regulation; (2) for revenue. The power here exercised is for revenue and not for regulation. Here the granting of the license is an incident to the power to raise revenues. The license is the means, not the end. It is the method provided for raising the revenues. The penalty provided is merely a mode of enforcing payment, and the license is only a receipt for the tax. Home Insurance Co. v. City Council, 93 U. S. 116. The tax is an excise. It is levied upon the right to do business, not upon the right to exist; nor upon the property. The cases relied upon by appellant on this point so characterize such a tax. State ex rel. Zielonka v. Carrel, 124 N. E. 134; Cincinnati v. American Telephone & Telegraph Co., 147 N. E. 806; Firestone v. Cambridge, 148 N. E. 471.

In I Cooley on Taxation (4th ed.), § 26, it is said:

"One distinction between a tax upon a business * * * and a license is said to be 'that the former is exacted by reason of the fact that the business is carried on * * * within the jurisdiction of the taxing power, and the latter is required as a condition precedent to the right to carry on such business * * * within the jurisdiction.' So it has been said that a charge cannot be deemed a license rather than a tax unless the payment thereof confers some right or privilege upon the person charged which otherwise would not exist."

A license is granted under the police power; an excise is imposed under the taxing power. The former is essentially not a tax at all. I Cooley, Taxation (4th ed.), § 26.

"The distinction between a demand of money under the police power and one made under the power to tax is not so much one of form as of substance. The proceedings may be the same in the two cases, although the purpose is essentially different. The one is made for regulation and the other for revenue. If for regulation, it is an exercise of the police power while if for revenue it is an exercise of the taxing power." I Cooley, Taxation (4th ed.), § 27.

[fol. 41] Bearing this distinction in mind, we shall examine briefly the statutes, by virtue of which appellant contends that the state has preempted the field of taxation covered by the ordinance.

Laws of 1929, chapter 107, requires public utility companies, subject to regulation as to rates and charges by the department of public works, to "pay to the department of public works a fee of 1/10 of one per cent of such gross operating revenue. * * *" This act is amendatory of § 1 of chapter 107 of the Laws of 1923, which in turn was amendatory of §§ 1 and 3 of chapter 113 of the Laws of 1921. The earlier laws fixed flat rates, determined by gross earnings, ranging from five dollars to $1,500.

Laws of 1921, chapter 113, § 1, refers to persons and corporations required to file statements with the director of public works under § 78, chapter 117, Laws of 1911, and requires them to pay "*a fee*" in accordance with a fixed schedule. Section 2, chapter 113, Laws of 1921, then provides:

"All sums collected by the director of public works under the provisions of this act shall within thirty days after their receipt be paid to the state treasurer, and by him deposited in a *fund to be known as the public service revolving fund.*"

Chapter 117, Laws of 1911, is the public service commission law, and is purely a regulatory act. State ex rel. Webster v. Superior Court, 67 Wash. 37, 120 Pac. 861; Seattle Electric Co. v. Seattle, 78 Wash. 203, 138 Pac. 892. Obviously, chapter 107, Laws of 1929, chapter 107, Laws of 1923, and chapter 113, Laws of 1921, are adjuncts to that act. It is equally obvious, from the words which we have

italicized in § 2 of the latter act, that the fund created was solely for the purpose of defraying the expense attendant to the administration of the public service commission law. We think it is clear, from the entire context of the act of 1921, that the purpose of it was regulatory. The raising of the rates in the act of 1923 and the changing of the [fol. 42] method of computation of the fee to be paid in the act of 1929 have not changed its character.

It is further contended that by chapter 227, Laws of 1929, the state has preempted this field of taxation. That act is entitled, "An Act relating to fees of foreign and domestic corporations * * *;" and the tax exacted has been held to be a license fee to which corporations are subjected for the privilege of doing business in this state in a corporate capacity—as a corporate entity. In Spokane International Ry. Co. v. State, 162 Wash. 395, 299 Pac. 362, construing this act, it is said:

"The tax is upon the privilege the state grants to the corporation to engage in commerce with the advantages derived from a corporate organization, not upon the commerce itself."

III. That "Gross Income" is a proper basis for determining the amount of the tax to be paid, is well established by the authorities. I Cooley, Taxation (4th ed.), § 42; State v. Minnesota & International R. Co., 118 N. W. 679; State v. Central Trust Co., 67 Atl. 267; People ex rel. Westchester Lighting Co v. Gaus, 92 N. E. 230; State v. United Electric Light & Water Co., 97 Atl. 857; Nebraska Telephone Co. v. Lincoln, 117 N. W. 284. The definition of "Gross Income," contained in the ordinance, is substantially the same as that contained in the act of West Virginia, considered in the case of Hope Natural Gas Co. v. Hall, State Tax Commissioner, 274 U. S. 284. The tax challenged in that case was sustained. It would be practically impossible to define "Gross Income" so that more or less pertinent objections could not be aimed at the definition. We are satisfied, however, that the objections raised by appellant are more fancied than real; and that, in practical application, under present day systems of accounting, appellant will have no serious difficulty in ascertaining the amount of tax it is required to pay. The task of segregating revenues derived without the city from those

[fol. 43] derived within, affords no legal objection to the tax. Western Union Tel. Co. v. Fremont, 58 N. W. 415; Postal Telegraph Cable Co. v. Charleston, 153 U. S. 692.

IV. It is next contended that the tax is unreasonable, oppressive and confiscatory. "The power to tax carries with it the power to destroy," has been so frequently stated that it has become axiomatic. Yet, practically, the power to tax is limited to what is reasonable. Oppressive or confiscatory taxes ordinarily will not be sustained. But whether a tax is reasonable is primarily a legislative problem, and the courts will not hold a tax invalid on the ground that it is oppressive or confiscatory unless there is clear abuse of the power conferred. It is said in IV Cooley, Taxation (4th ed.), § 1714:

"Where an excise tax is imposed for revenue, as distinguished from a fee imposed merely for regulation, the extent of the tax, when not limited by the grant itself, must be understood to be left to the judgment and discretion of the municipal government, to be determined in the usual mode in which its legislative authority is exercised; but the grant of authority to impose fees for the purposes of revenue does not warrant their being made so heavy as to be prohibitory, thereby defeating the purpose, where the business or occupation is a useful and lawful one, although there is some authority apparently to the contrary which would preclude a court from considering the amount of the tax in any case. So far as the right to engage in a business of a harmless and useful character is concerned, 'the state may not impose an occupation tax which shall operate as a prohibition or as a burden of magnitude sufficient to render the right valueless.' But a tax for revenue possibly may be made so large as to be prohibitive, where the occupation may be prohibited, although in such a case the fee ordinarily is deemed an exercise of the police power rather than of the taxing power."

This rule has been stated by this court. Stull v. De Mattos, 23 Wash. 71, 62 Pac. 451, 51 L. R. A. 892; In re Garfinkle, 37 Wash. 650, 80 Pac. 188.

In Nebraska Telephone Co. v. Lincoln, 117 N. W. 284, a levy of two per cent of gross earnings was upheld. A tax of five per cent was sustained in Lincoln Traction Co.

v. Lincoln, 121 N. W. 435. In City of St. Louis v. United Rys. Co., 174 S. W. 78, a tax was levied, and upheld, on [fol. 44] each car used for transporting passengers, at the rate of one mill for every passenger carried. A tax of two per cent on gross receipts was upheld in Southwestern Oil Co. v. State of Texas, 217 U. S. 114. In that case, quoting from Delaware Railroad Tax Cases, 18 Wall. 206, the court said:

"* * * 'it is not for us to suggest in any case that a more equitable mode of assessment or rate of taxation might be adopted than the one prescribed by the legislature of the State; our only concern is with the validity of the tax; all else lies beyond the domain of our jurisdiction.'"

We do not think the rate fixed by the ordinance is unreasonable, oppressive or confiscatory.

V. Appellant next contends that, under the act of Congress of July 24, 1866 (14 Statutes L. 221), it has the right to occupy the streets without the city's consent. Conceding this right, it does not impair the city's power to levy taxes on the beneficiaries of the act. In Williams v. Talladega, 226 U. S. 404, it is said:

"These cases, taken together, establish the proposition that the privilege given under the terms of the act to use the military and post roads of the United States for the poles and wires of the company is to be regarded as permissive in character and not as creating corporate rights and privileges to carry on the business of telegraphy, which were derived from the laws of the State incorporating the company, and that this permissive grant did not prevent the State from taxing the real or personal property belonging to the company within its borders or from imposing a license tax upon the right to do a local business within the State."

The demurrer to the amended complaint was properly sustained, and the judgment is affirmed.

Blake, J. Main, J.

We concur.

Beals, C. J. Holcomb, J. Millard, J. Mitchell, J. Tolman, J., took no part.

[fol. 45] IN SUPREME COURT OF WASHINGTON

No. 24327

DISSENTING OPINION

STEINERT, J., dissenting:

I can not agree with either the reasoning or the result of the majority opinion. It is to be borne in mind that the case is before us on the amended complaint, a demurrer thereto which was sustained, and a judgment dismissing the action.

The amended complaint is too long to be set forth in its entirety; a brief summary of it must suffice. Its allegations may be reduced to the following statement: Appellant is a California corporation and as such has complied with the laws of this state relating to foreign corporations. It owns and operates a telephone and telegraph system and does both an intrastate and interstate business. For the sake of convenience and adequate service to its patrons, it has divided the state of Washington into a number of exchange areas. The "Seattle exchange area" includes several thousand telephones outside the limits of the city of Seattle. Service between telephones within the same exchange area is designated "telephone exchange service"; the service between telephones located in different exchange areas is designated "telephone toll service". The company's accounts are kept in accordance with forms prescribed by the Interstate Commerce Commission and the Department of Public Works of Washington. The company has a central office equipment in Seattle having a value in excess of ten million dollars. Through its central office is rendered not only exchange service within the Seattle exchange, but also toll service, both intra-state and interstate. The company also has central office equipments in the other exchange areas throughout the state, aggregating in value about twenty million dollars. The company's business in the city of Seattle, according to the amended complaint, has at all times been conducted in an efficient [fol. 46] and economical manner. Its net earnings derived from its business in the Seattle exchange during the first three months of 1932, stated in rate per cent annual return upon the cost of its property used and useful in fur-

nishing service within the exchange, were not in excess of 3.25%; its net earnings from business wholly within the city's limits were somewhat less. Subsequent to the first three months of 1932, the net earnings declined, and conditions existing at the time that the action was commenced indicate a probable further decline. The company has paid all its taxes for the years prior to 1931. In 1932 it paid taxes, for 1931, on its real estate inside the city, in the sum of $96,908.41, of which the city received $44,164.01 as its proportion. The company also paid $302,590.97 as the first half of 1931 personal property taxes, of which the city received $126,664.52. The remaining half became payable after this action had been commenced.

It is alleged in the amended complaint that the company was licensed by the state of Washington to engage in the telephone and telegraph business in and throughout the state, including the city of Seattle, for which license it paid the state, in 1932, a fee of $12,777.11; that the duty to give telephone service in Seattle and elsewhere in the state is a continuous one and can not be terminated except with the consent of the state; and that for more than twenty-one months last past the company has not earned a fair return upon its property, and that the tax is arbitrary, unreasonable and confiscatory. The demurrer, of course, admits these allegations.

My first reason for dissent is that under the allegations of the amended complaint a prima facie case is stated. Not only is it directly alleged that the license fee is arbitrary, unreasonable and confiscatory, but sufficient facts to support the allegation, if it be considered as a mere conclusion, are also stated. We can not disregard those facts or the issue tendered thereby. If the city can fix the rate [fol. 47] at four per cent, it can also fix it at ten. It is as easy to specify the one as it is the other. There is no innate virtue in the figure four, nor any inherent vice in the figure ten. We can not say, nor are we privileged to say, dogmatically, that a fee of four per cent, as prescribed by the ordinance, is not unreasonable or confiscatory, or that a fee of ten per cent would be. It will require evidence, probably of an expert nature, to show what the actual situation is, and, until that evidence is produced, we can not prejudge it. The demurrer should have been overruled for this reason alone, if for no other.

But I go further. The ordinance is not regulatory, but simply one for revenue. Not only does the ordinance declare it to be a revenue measure, but its very terms make no provision for regulation. This much is conceded in the majority opinion. The question then presents itself: Has the city the right to compel the company to obtain a license from it and to pay a tax or fee therefor before it can continue to carry on its business within the city?

Section 3 of the ordinance provides that after July 1, 1932, no person may engage in any business, occupation, pursuit or privilege for which a license fee or tax is imposed, without a license; that any taxpayer who carries on his business without such license shall be guilty of a violation of the ordinance for each day that the business is carried on or conducted. Section 24 provides that any person failing to comply with any of the provisions of the ordinance shall be guilty of a misdemeanor, punishable by a fine in any sum not to exceed three hundred dollars or by imprisonment in the city jail for a term not exceeding ninety days, or by both such fine and imprisonment.

If the city can not compel the taking out of a license, then it can not impose the tax. In the case before us the company had, under chapter 227, Laws of 1929, § 5, Rem. [fol. 48] Rev. Stat., § 3836-5, paid the state the sum of over twelve thousand dollars for the privilege of doing business in the state of Washington, for the year 1932. The privilege so obtained was comprehensive and subject to no limitations. The city could not give the company something that it already had; nor, conversely, could it take away or withhold a right that the company then possessed. The sovereign having granted the right, the city could not withdraw it. Since it could not take it away, it can not hamper its exercise in the manner attempted. Mayor and Aldermen of Savannah v. Georgia, 36 Ga. 460; Reser v. Umatilla County, 48 Ore. 326, 86 Pac. 595; Cooley on Taxation, 4th Ed., § 1691. A license is simply the authority to conduct a business or pursue a calling, or the right conferred by the municipality which makes the pursuit lawful and without which it would be unlawful. The appellant having been authorized by the state to conduct its business within the state, the city can not make that pursuit unlawful.

The majority opinion cites the following cases in support of the rule that cities and towns may impose taxes either for revenue or regulation: Fleetwood v. Read, 21 Wash. 547, 58 Pac. 665; Walla Walla v. Ferdon, 21 Wash. 308, 57 Pac. 796; Stull v. DeMattos, 23 Wash. 71, 62 Pac. 451; In re Garfinkle, 37 Wash. 650, 80 Pac. 188; Town of Sumner v. Ward, 126 Wash. 75, 217 Pac. 502; Town of Bucoda v. Swaney, 163 Wash. 43, 299 Pac. 652. Those cases do announce that rule, it is true, but neither they nor the rule therein announced are applicable here, for the reason that in none of those instances had the state previously granted the privilege. Consequently, the municipality there had the right to exact a license for the conduct of the business, and the payment of a tax therefor. If the parties did not care to engage in business on the terms exacted, they could either have refrained from entering [fol. 49], upon it or else withdrawn if they had already begun. The situation here is not at all comparable. The company can not withdraw from the field but must continue to function; that was one of the considerations for which it was permitted to enter the state.

Approaching the matter from a somewhat different angle, I am of the view that the particular field of taxation had already been preempted by the state under chapter 113, Laws of 1921, Rem. Comp. Stat., § 10417, chapter 107, Laws of 1923, Rem. 1927 Sup., § 10417, both amended by chapter 107, Laws of 1929, Rem. Rev. Stat., §§ 10417-10419; and chapter 227, Laws of 1929, § 5, Rem. Rev. Stat. § 3836-5. The amending act of 1929 requires every public utility to file with the Department of Public Works an annual statement showing its gross operating revenues for the preceding year, and to pay a fee of one-tenth of one per cent thereon. All such fees are required to be deposited in the public service revolving fund. The act makes the failure to pay such fees a misdemeanor punishable by a fine for each day's failure to pay. The last act requires all foreign corporations doing intra-state business in this state to pay certain fees for the privilege of doing such business. Those acts are, in my opinion, purely license acts and not regulatory. The funds derived therefrom are not devoted to the purpose of regulation, but, with the exception of the annual fees paid to the secretary of state, are required to be paid into the public service revolving fund, which is a general

fund of the state subject to reappropriation by the legislature. The right to appropriate funds, under Art. VIII, § 4, of the state Constitution, is recognized in State ex rel Bloedel-Donovan Lumber Mills v. Clausen, 122 Wash. 531; 211 Pac. 281, and State ex rel. Shuff v. Clausen, 131 Wash. 119, 229 Pac. 5. The state having occupied the field of excise taxation, the city may not encroach upon it. We have here the same situation, in principle, as was presented in State ex rel. Webster v. Superior Court, 67 Wash. 37, 120 Pac. 861, where the right of the state was declared [fol. 50] supreme and exclusive. The state having granted the privilege and having taxed it, the city could not thereafter exact an additional sum for the same privilege or right; otherwise, the municipality, by added exactions, could thwart the whole purpose of the state in admitting corporations to do a specific business therein on such terms as it saw fit to fix. The sovereign would be subsidiary to its various subdivisions. Cincinnati v. American Telephone & Telegraph Co., 112 Ohio St., 493, 147 N. E. 806; Firestone v. City of Cambridge, 113 Ohio St., 57, 148 N. E. 470; Cincinnati Oil Works v. City of Cincinnati, 123 Ohio St. 448, 177 N. E. 768.

Further, I think that the definition of "Gross Income", in the ordinance, is so vague and uncertain as to render the ordinance inoperative and void. By its provisions the ordinance is penal. Fine and imprisonment are the penalties for non-compliance. The taxpayer is entitled to know definitely and certainly the amount of tax which he is required to pay and the method of its ascertainment, without the expense of litigation necessary to determine either. Western Union Telegraph Co. v. Texas, 62 Tex. 630; State ex rel Crow, Attorney General, v. West Side Street Ry. Co., 146 Mo. 155, 47 S. W. 959; Standard Oil Co. v. State, 178 Ala. 400, 59 So. 667; Winslett v. Case-Fowler Lumber Co., 173 Ga. 539, 160 S. E. 384.

Looking at the terms of the ordinance, I do not see how the taxpayer could possibly determine the amount of tax to be paid by it, or the method of its ascertainment, without resort to litigation. Different and vitally conflicting views will arise out of the interpretation of its language. Section 2 of the ordinance reads as follows, with reference to the definition of income:

"Gross Income: The value proceeding or accruing from the sale of tangible property or service, and receipts (including all sums earned or charged, whether received or not) by reason of the investment of capital in the business engaged in, including rentals, royalties, fees or other [fol. 51] emoluments, however designated (excluding receipts or proceeds from the use or sale of real property or any interest therein, and proceeds from the sale of notes, bonds, mortgages or other evidences of indebtedness or stocks and the like) and without any deduction on account of the cost of the property sold, the cost of materials used, labor, costs, interest or discount paid, or any expense whatsoever, and without any deduction on account of losses."

Does the word "value" as there used import "cost price", "sale price", or "net profit" on the sale of tangible property or service? If any one of these was intended, it could easily have been expressed. Again, the word "receipts" expressly excludes receipts or proceeds from the use or sale of real property. Appellant's equipment to the extent of millions of dollars is housed in, and in large part is permanently affixed to, buildings which are a part of the realty. Are the receipts from that source, pro tanto, to be deducted? Who shall say? How is anyone to know? It may confidently be assumed that the city will insist that no deductions are to be made in that respect. As confidently may it be assumed that the appellant will insist to the contrary. Many other questions are raised by the wording of this section, all of which lead to confusion in the attempt to interpret them. The majority opinion says that the definition of "Gross Income" in the present ordinance is substantially the same as that contained in the act of West Virginia, considered and sustained in the case of Hope Natural Gas Co. v. Hall, State Tax Commissioner, 274 U. S. 284. I do not so read it. That act provided that persons engaging in certain businesses should pay a tax "equal to the value of the articles produced as shown by the gross proceeds derived from the sale thereof by the producer (except as hereinafter provided) multiplied by the respective rates". The language is not only entirely different, but upon its very face it shows that the tax is

to be computed on the gross sales of the products. No such certainty or definiteness appears here. The rule by which the tax is to be measured should be definite and certain, and its definiteness and certainty should appear from [fol. 52] its provisions and not be the product of either litigation or compromise.

For the reasons suggested, and rather briefly stated in the light of the extended discussion in the briefs, I dissent.

Steinert, J.

[fol. 53] IN SUPREME COURT OF WASHINGTON

[Title omitted]

ORDER DENYING REHEARING—Filed June 14, 1933

The court having considered the appellant's petition for a rehearing herein;

It is ordered that the said petition be and it hereby is denied.

Dated this 14 day of June, 1933.

By the Court:

Walter B. Beals, Chief Justice.

[File endorsement omitted.]

[fol. 54] IN SUPREME COURT OF WASHINGTON

No. 24327

THE PACIFIC TELEPHONE & TELEGRAPH COMPANY, Appellant,

vs.

CITY OF SEATTLE et al., Respondents

JUDGMENT—June 14, 1933

This cause having been heretofore submitted to the Court, upon the transcript of the record of the Superior Court of King County, and upon the argument of counsel, and the court having fully considered the same, and being fully advised in the premises, it is now, on this 14th day

of June, A. D. 1933, on motion of A. C. Van Soelen, Esquire, of counsel for respondents, considered, adjudged and decreed, that the judgment of the said Superior Court be, and the same is, hereby affirmed with costs; and that the said City of Seattle et al. have and recover of and from the said The Pacific Telephone & Telegraph Co. and from the United States Fidelity and Guaranty Co. surety the costs of this action taxed and allowed at One Hundred & Fifty-three & 40/100 Dollars, and that execution issue therefor. And it is further ordered, that this cause be remitted to the said Superior Court for further proceedings, in accordance herewith.

[fol. 55] [File endorsement omitted]

IN SUPREME COURT OF WASHINGTON

No. 24327

PETITION FOR APPEAL FROM THE SUPREME COURT OF THE STATE OF WASHINGTON TO THE SUPREME COURT OF THE UNITED STATES—Filed June 19, 1933

To the Chief Justice of the Supreme Court of the State of Washington:

The Pacific Telephone and Telegraph Company, a California corporation, your petitioner, respectfully shows:

I

Your petitioner is the appellant in the above entitled cause.

II

Your petitioner filed an amended complaint in the Superior Court of the State of Washington, for King County, on the 17th day of October, 1932, asking for an injunction against the respondents above named, restraining them from enforcing, as against this petitioner, Ordinance No. 62662, entitled:

"An ordinance relating to, and providing for, a license or occupation tax upon certain businesses, occupations, pursuits and privileges; defining offenses and providing penalties,"

which ordinance was passed by the City Council of the [fol. 56] City of Seattle, Washington, on the 23rd day of May, 1932, and approved by the Acting Mayor of said City on the 25th day of May, 1932, upon the ground that the said ordinance was violative of the statutes and Constitution of the State of Washington and of the Constitution of the United States. A copy of said ordinance was attached to the said amended complaint as Exhibit "A". The grounds on which said ordinance is claimed to be invalid by this petitioner are all more particularly set forth in paragraph XIX of the said amended complaint.

III

The respondents appeared in the said Superior Court and demurred to the said amended complaint upon the ground that the said complaint did not state facts sufficient to constitute a cause of action, which demurrer was, by the said Superior Court, sustained on the 18th day of October, 1932. That your petitioner thereupon elected to stand upon its amended complaint and declined to plead further, and that the said Superior Court thereupon, on the said 18th day of October, 1932, dismissed the said action; that thereafter an appeal was prosecuted by your petitioner from said judgment of dismissal to the Supreme Court of the State of Washington, and upon said appeal the said decree of the Superior Court of the State of Washington, for King County, was affirmed by the Supreme Court of the State of Washington, in an opinion filed on the 21st day of April, 1933; that thereafter, within the thirty days allowed by the statutes of the State of Washington, your petitioner applied for a rehearing of said cause, which was denied by the said Supreme Court of the State of Washington on the 14th day of June, 1933, and the final judgment of the said Supreme Court of the State of Washington was entered on the 14th day of June, 1933, [fol. 57] affirming the said judgment of the Superior Court of the State of Washington, for King County.

IV

That the said Supreme Court of the State of Washington is the highest court of said state in which a decision can be had upon the matters alleged by your petitioner in this suit.

V

That in said cause there is drawn in question the validity of an ordinance of a municipal corporation existing by and under the laws of the State of Washington, on the ground that the said ordinance is repugnant to the Constitution and Laws of the United States, and the decision is in favor of its validity, notwithstanding your petitioner's contention that the said ordinance violates the Fourteenth Amendment to the Constitution of the United States.

VI

That, therefore, in accordance with the Judicial Code, Section 237(a) (U. S. C., Title 28, Section 344), and in accordance with the Rules of the Supreme Court of the United States (Rule 46, Par. 2), your petitioner respectfully shows this court that the case is one in which, under the legislation in force when the Act of January 31, 1928 (45 Stat. 54), was passed, to-wit, under Section 237(a) of the Judicial Code (U. S. C., Title 28, Section 344), a review could be had in the Supreme Court of the United States on writ of error, as a matter of right.

[fol. 58]

VII

The errors upon which your petitioner claims to be entitled to an appeal are more fully set out in the assignment of errors filed herewith pursuant to Rules 9 and 46 of the Supreme Court of the United States; and there is likewise filed herewith a statement as to the jurisdiction of the Supreme Court of the United States, as provided by Rules 12 and 46 of the Rules of the Supreme Court of the United States.

Wherefore your petitioner prays for the allowance of an appeal from the said Supreme Court of the State of Washington, the highest court of said state in which a decision can be had, to the Supreme Court of the United States, in order that the decision and final judgment of the said Supreme Court of the State of Washington may be examined and reversed, and also prays that a transcript of the record, proceedings and papers in this cause, duly authenticated by the clerk of the Supreme Court of the State of Washington under his hand and the seal of the said

court, may be sent to the Supreme Court of the United States, as provided by law, and that said appeal may operate as a supersedeas, and that an order be made touching the security to be required of the petitioner, and that the supersedeas bond tendered by the petitioner be approved.

Maurice McMicken, H. J. Ramsey, Otto B. Rupp, Alfred J. Schweppe, McMicken, Ramsey, Rupp & Schweppe, Attorneys for Petitioner, 660-671 Colman Building, Seattle, Washington.

[fol. 59] [File endorsement omitted]

IN SUPREME COURT OF WASHINGTON

No. 24327

[Title omitted]

ASSIGNMENT OF ERRORS AND PRAYER FOR REVERSAL—Filed June 19, 1933

The petitioner assigns the following errors in the record and proceedings in this cause:

I

The Supreme Court of the State of Washington erred in refusing to hold that Ordinance No. 62662 of the City of Seattle, Washington, was so vague and indefinite as to violate the due process clause of the Fourteenth Amendment to the Constitution of the United States, in that the definition of gross income in said ordinance renders it impossible for the appellant to compute, with reasonable certainty, the amount of the taxes, if any, owing by it thereunder, and subjects appellant to criminal penalties for noncompliance with the said vague and indefinite terms of said ordinance.

[fol. 60] II

The Supreme Court of the State of Washington erred in refusing to hold that said ordinance is so vague and indefinite as to violate the due process clause of the Fourteenth Amendment to the Constitution of the United States.

in that the said ordinance fixes no method of computation whereby appellant, with reasonable certainty, can segregate its interstate business from its business conducted wholly within the City of Seattle, nor any method whereby appellant can, with reasonable certainty, segregate its business conducted wholly within the City of Seattle from its intrastate business conducted between the said City of Seattle and points outside said city.

III

The Supreme Court of the State of Washington erred in refusing to hold that the said ordinance conflicts with the due process clause of the Fourteenth Amendment to the Constitution of the United States, in that appellant is not now and for more than twenty-one months last past has not been earning a fair return upon its property within the City of Seattle used and useful in the public service, and that said license fee, or any portion thereof, required by said ordinance is arbitrary, unreasonable, oppressive, and confiscatory of appellant's property.

IV

The Supreme Court of the State of Washington erred in refusing to hold that the said ordinance violates the due process clause of the Fourteenth Amendment to the Constitution of the United States, in that said ordinance undertakes completely to prohibit the doing of an entirely law-[fol. 61] ful business except upon payment of a license fee, although said City confers no privilege to do business upon appellant inasmuch as appellant's business in said City is regulated exclusively by the Department of Public Works of the State of Washington under the public service laws of said state, and appellant cannot withdraw from its business, or any portion thereof, in said City of Seattle, without the consent of the State of Washington.

V

The Supreme Court of the State of Washington erred in refusing to hold that the said ordinance conflicts with the equal protection clause of the Fourteenth Amendment to the Constitution of the United States, in that the license fees fixed by said ordinance are arbitrary and discrimi-

natory because different rates are fixed by said ordinance on businesses (public utilities) in the same general class.

VI

The Supreme Court of the State of Washington erred in refusing to hold that the said ordinance conflicts with the equal protection clause of the Fourteenth Amendment to the Constitution of the United States, in that the license tax imposed upon gross income thereunder, being a direct property tax, constitutes an additional property tax on the property of the appellant and is levied on an unequal and discriminatory basis on the public utilities and other persons, firms and corporations included in and affected by the said ordinance.

Wherefore, on account of the errors hereinbefore assigned, petitioner prays that the said judgment of the [fols. 62-81] Supreme Court of the State of Washington, dated the 14th day of June, 1933, in the above entitled cause, be reversed and judgment rendered in favor of this appellant.

Dated this 19th day of June, 1933.

Maurice McMicken, H. J. Ramsey, Otto B. Rupp, Alfred J. Schweppe, McMicken, Ramsey, Rupp & Schweppe, Attorneys for Appellant.

660-671 Colman Building, Seattle, Washington.

[fol. 82] [File endorsement omitted]

IN SUPREME COURT OF WASHINGTON

No. 24327

THE PACIFIC TELEPHONE AND TELEGRAPH COMPANY, a Corporation, Appellant,

vs.

THE CITY OF SEATTLE, a Municipal Corporation, and HARRY W. CARROLL, as Comptroller of the City of Seattle, Respondents

ORDER ALLOWING APPEAL—Filed June 19, 1933

The petition of The Pacific Telephone and Telegraph Company, the appellant in the above entitled action, for an

appeal in the above cause to the Supreme Court of the United States from the judgment of the Supreme Court of the State of Washington, having been presented herein, accompanied by an assignment of errors and statement as to jurisdiction, all as provided by Rule 46 of the Rules of the Supreme Court of the United States, and the record in this cause having been considered, it is hereby

Ordered that an appeal be and it is hereby allowed to the Supreme Court of the United States from the final judgment of the Supreme Court of the State of Washington on June 14, 1933, as prayed in said petition, and that the clerk of the Supreme Court of the State of Washington shall, within sixty days from this date, make and transmit to the Supreme Court of the United States, under his hand and the seal of the court, a true copy of the material parts of the record herein, which shall be designated by a præcipe or stipulation of the parties or their counsel herein, all in accordance with Rule 10 of the Rules of the Supreme Court of the United States.

It is further ordered that the said appellant shall give a [fol. 83] good and sufficient supersedeas bond, in the sum of twenty-five thousand Dollars ($25,000.00), that said appellant shall prosecute said appeal to effect, and answer all damages and costs if it fails to make its plea good; and that said supersedeas bond, when filed and approved, shall stay the sending down to the Superior Court of the remittitur herein and of all proceedings in this cause, and the enforcement of Ordinance No. 62662 of the City of Seattle, Washington, or any part thereof, against appellant, until the final disposition of this cause by the Supreme Court of the United States.

Done in open court this 19th day of June, 1933.

Walter B. Beals, Chief Justice of the Supreme Court of the State of Washington.

[fols. 84–86] Supersedeas bond on appeal for $25,000, approved and filed June 19, 1933, omitted in printing.

[fols. 87–89] Citation, in usual form, showing service on A. C. Van Soelen et al., filed June 21, 1933, omitted in printing.

[fol. 90] [File endorsement omitted]

SUPREME COURT OF THE UNITED STATES

[Title omitted]

PROOF OF SERVICE OF PAPERS UNDER RULE 12, UNITED STATES SUPREME COURT RULES—Filed June 21, 1933

Service, pursuant to Rule 12, paragraph 2, Rules of the Supreme Court of the United States, is hereby acknowledged of copies of the following papers in the above entitled cause:

1. Petition for Appeal.
2. Order Allowing Appeal.
3. Assignment of Errors.
4. Statement as to Jurisdiction.

Dated this 20th day of June, 1933.

A. C. Van Soelen, Corporation Counsel of the City of Seattle; Walter L. Baumgartner, Assistant Corporation Counsel of the City of Seattle; Charles V. Hoard, Attorneys for Appellees.

Address: 515 County-City Building, Seattle, Washington.

[fol. 91] [File endorsement omitted]

IN SUPREME COURT OF WASHINGTON

No. 24327

[Title omitted]

PRÆCIPE FOR TRANSCRIPT ON APPEAL—Filed June 21, 1933

To the Clerk of the above-entitled court:

Please prepare a transcript of record on appeal of the above entitled cause to the Supreme Court of the United States, including therein the following papers and documents:

1. Amended Complaint.
2. Demurrer to Amended Complaint.

3. Judgment and Decree of Dismissal, including Notice of Appeal endorsed thereon.
4. Bond on Appeal to the Supreme Court of the State of Washington.
5. Certificate of Clerk of the Superior Court.
6. Opinion of the Supreme Court of the State of Washington, and dissenting opinion.
7. Order denying Petition for Rehearing.
8. Judgment and Decree of the Supreme Court of the State of Washington.
9. Petition for Appeal to the Supreme Court of the United States.
19. Assignment of Errors.
11. Statement as to Jurisdiction of the Supreme Court of the United States.
12. Order Allowing Appeal and Fixing Supersedeas.
13. Supersedeas Bond.
[fol. 92] 14. Citation.
15. Statement directing attention to Rule 12, United States Supreme Court Rules.
16. Proof of Service of papers required by Rule 12, United States Supreme Court Rules.
17. Præcipe for Transcript on Appeal.
18. Clerk's Certificate.

Maurice McMicken, H. J. Ramsey, Otto B. Rupp, Alfred J. Schweppe, Attorneys for Appellant.

Service of the foregoing Præcipe, by receipt of a copy thereof, is acknowledged this 20 day of June, 1933.

A. C. Van Soelen, Corporation Counsel of the City of Seattle; Walter L. Baumgartner, Assistant Corporation Counsel of the City of Seattle; Charles V. Hoard, Attorneys for Respondents.

[fol. 93] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 94] SUPREME COURT OF THE UNITED STATES

STATEMENT OF POINTS AND DESIGNATION OF PARTS OF RECORD TO BE PRINTED—Filed Aug. 19, 1933

(Pursuant to Rule 13 (9))

[fol. 95] Comes now the appellant and adopts its assignments of error as its statement of the points to be relied

upon, and represents that the whole of the record, as filed, is necessary for the consideration of the case.

Dated at Seattle, Washington, August 8, 1933.

Maurice McMicken, H. J. Ramsey, Otto B. Rupp,
Alfred J. Schweppe, Attorneys for Appellant.

[fol. 96] [File endorsement omitted.]

Endorsed on cover: File No. 37,967. Washington Supreme Court. Term No. 364. The Pacific Telephone and Telegraph Company, appellant, vs. The City of Seattle and Harry W. Carroll, as Comptroller, etc. Filed August 19, 1933. No. 364, O. T., 1933.